

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEFFREY GUEBLE and ELIZABETH PEABODY, husband and wife,)	NO. 56934-1-I
)	
)	DIVISION ONE
Respondent,)	
)	
v.)	
)	
CANYON PARK RESTAURANT CORPORATION, a Washington corporation; JAMES R. FOPPIANO and GEORGANNE M. FOPPIANO, husband and wife;)	
)	
)	
Defendants,)	
)	
ROBERT F. GOODWIN and JANE DOE GOODWIN, husband and wife,)	Unpublished Opinion
)	
Appellants.)	FILED: September 5, 2006
)	

COLEMAN, J.—Robert Goodwin signed a guaranty for a lease agreement. The lessee breached the lease. Jeffrey Gueble and Elizabeth Peabody (the Guebles) terminated the lease and obtained judgment against the lessee. The Guebles then obtained summary judgment against the Goodwins. The Goodwins appeal.

The Goodwins raise a number of issues in this appeal involving the requirements for declarations supporting a summary judgment motion, hearsay, chain of title, interpretation of the lease agreement, res judicata, and personal jurisdiction. Because we find no merit in these arguments, we affirm.

FACTS

Jeffrey Gueble and Elizabeth Peabody, husband and wife, own commercial property on the Bothell-Everett Highway in Bothell. In July 1992, Bert and Diane Amick, the then-owners of the property, signed a 20-year lease agreement for the property with the Canyon Park Restaurant Corporation. The agreement provides that if the lessee materially defaulted or breached the agreement, the lessor could terminate the lease and recover damages. Lease Agreement ¶ 16.2(b). Alternatively, the lessor could maintain the lease and recover rent as it became due. Lease Agreement ¶ 16.2(a). If the lessor chose to maintain the lease and recover rent under paragraph 16.2(a) of the agreement, the lessor could still relet the property, in which case the original lease would terminate automatically upon the new lessee taking possession.¹

¹ The lease agreement reads,

“16.2 Remedies. In the event of any such material default or breach by Lessee, Lessor may, at any time thereafter, with or without notice and demand and without limiting Lessor in the exercise of any right or remedy at law or in equity which Lessor may have by reason of such default or breach:

“(a) Maintain this Lease in full force and effect and recover the rent and other monetary charges as they become due, without terminating Lessee’s right to possession In the event Lessor elects to not terminate the Lease, Lessor shall have the right to attempt to relet the Premises In the event any such reletting occurs, this Lease shall terminate automatically upon the new Lessee taking possession of the Premises. . . .

“(b) Terminate Lessee’s right to possession by any lawful means, in which case this Lease shall terminate and Lessee shall immediately surrender possession of the

Robert F. Goodwin and James R. Foppiano signed guaranty agreements. Canyon Park failed to pay rent in December 2003. In subsequent months, Canyon Park made late payments and made no payments after May 2004.

The Guebles brought an unlawful detainer action against Canyon Park, the Goodwins, and the Foppianos. The Goodwins were not served. In October 2004, the Guebles obtained an order of default, default judgment, and an order issuing a writ of restitution against Canyon Park and against the Foppianos. The Guebles relet the property to a new tenant with a lease date of December 17, 2004.

The Guebles next brought suit in October 2004 against Canyon Park, the Goodwins, and the Foppianos for breach of contract and breach of the guaranties. The superior court granted default judgment against Canyon Park and summary judgment against the Foppianos and Goodwins. The judgment amount was \$352,300.63. The court noted that “[t]his judgment does not extend to Ms. Mar’s separate property.” The Goodwins appeal.

ANALYSIS

We begin by analyzing the Goodwins’ claim that the superior court erred in considering declarations in support of the Guebles’ summary judgment motion when the declarations did not state they were made under penalty of perjury, as required by RCW 9A.72.085. A declaration in support of a summary judgment motion must contain a recitation that the declaration “is certified or declared by the person to be true under

Premises to Lessor. In such event, Lessor shall be entitled to recover from Lessee all damages incurred by Lessor by reason of Lessee’s default. . . .”

penalty of perjury.” RCW 9A.72.085(1).

The Goodwins, however, were required to timely move to strike the nonconforming declarations, which they did not do. The Goodwins argue that their objection to the declarations at oral argument during the summary judgment proceedings was sufficient to preserve the issue. A failure to conform to RCW 9A.72.085 generally will render a declaration inadmissible upon challenge by an opposing party. But it was incumbent upon the Goodwins to move to strike when they filed their opposition to the summary judgment motion. If declarations supporting a summary judgment motion do not conform to the requirements of RCW 9A.72.085, the opposing party must not wait until oral arguments on the motion to object or move to strike. Raymond v. Pacific Chem., 98 Wn. App. 739, 744, 992 P.2d 517 (1999), rev’d on other grounds, Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349, 20 P.3d 921 (2001). Moreover, nothing in CR 56(c) allows a party opposing summary judgment to raise issues at any time other than its opposition papers. CR 56(c). In White v. Kent Med. Ctr., 61 Wn. App. 163, 810 P.2d 4 (1991), we held that under CR 56(c)—the rule governing summary judgment proceedings—a party seeking summary judgment must raise its issues in its motion and opening memorandum. White, 61 Wn. App. at 168. It follows that a nonmoving party must raise its issues in its opposition papers so that the superior court is fully advised of the issues raised when it hears oral arguments. We decline to reverse the summary judgment on this ground.

We next consider the Goodwins’ hearsay argument. The Goodwins argue that Jeffrey Gueble made statements in his declarations about events prior to his acquisition of the Bothell property and that

these statements were hearsay and not based on his personal knowledge. They also argue that the exhibits attached to Gueble's declarations were hearsay. They additionally argue that Gueble's declarations were not sufficient to authenticate the exhibits. We disagree.

While the declarations may have contained some immaterial hearsay, Gueble's declarations describe the Guebles' purchase of the property from the previous owner, the existence and terms of the lease agreement, the guaranties, the addendum/amendment, and the assignment of lessor's rights to the Guebles. Gueble was certainly competent to set forth these circumstances. The fact that Gueble was not one of the original parties to the lease agreement is irrelevant. Attaching copies of the lease agreement, the guaranties, and the addendum/amendment as foundation to establish the Goodwins' liability as guarantors of the lessee was not improper. Because Gueble's statements regarding the lease agreement and guaranties were not inadmissible hearsay, his declarations were sufficient to authenticate the exhibits.

We next consider the Goodwins' argument that the chain of title to the Bothell property is defective and that the superior court therefore erred in granting summary judgment. The Goodwins argue that genuine issues of fact exist regarding the correct chain of title. They contend that the lease demonstrates that the original owners were the Amicks. They further contend that Gueble's supplemental declaration purports to attach an unauthenticated assignment and assumption of the lease from Phoebe Marie Dylan LLC to the Guebles. They additionally contend that the record does not establish that Phoebe Marie Dylan, LLC, ever owned the lease. They argue that the chain of title is therefore defective. But

while it is true that the record does not establish how Phoebe Marie Dylan, LLC, acquired rights in the property or the lease, the Goodwins do not attempt to rebut the Guebles' assertion that the Guebles were assigned the lessor's rights in the lease. We decline to reverse summary judgment on this ground.

We next analyze the Goodwins' argument that a genuine issue of material fact existed whether the Guebles could recover for damages once they relet the property. The Goodwins contend that under the language of paragraph 16.2(a) of the lease agreement, the lease terminated upon the reletting of the property and that the Guebles could not recover damages in the absence of an underlying agreement. The Goodwins additionally argue that the termination of the lease at least raises a genuine issue of fact whether plaintiffs can collect damages. Again we disagree. We first note that the Guebles successfully brought an unlawful detainer action prior to filing the present lawsuit and that paragraph 16.2(b) of the agreement therefore governs. This paragraph explicitly allows the lessor to terminate the lease and subsequently recover all damages resulting from the lessee's default. But more importantly, nothing in the language of paragraph 16.2(a) supports the argument that termination of the lease upon reletting would relieve the lessee of its prior obligations for unpaid rent and other damages.

We next consider the Guebles' argument that a genuine issue of material fact exists whether the guaranty with Robert Goodwin's signature is genuine or was intended to be part of the lease agreement. The Goodwins argue that a copy of the guaranty bearing Robert Goodwin's signature is not numbered in conjunction with the copies of the lease agreement and

Foppiano's guaranty. They also argue that the guaranty lacks a notary certification. They contend that a question of fact exists whether Robert Goodwin intended to finalize his guaranty or whether the guaranty applies to the lease agreement. But because the Goodwins admitted in their answer that the signature on Robert Goodwin's guaranty was genuine, no genuine issue of material fact exists whether Robert Goodwin executed the guaranty.

In addition, the Goodwins do not demonstrate that a notary certification is required for an enforceable guaranty. Furthermore, the Goodwins do not attempt to rebut the Guebles' statement that the guaranty signed by Robert Goodwin is a guaranty of the lease agreement. In the absence of a contrary assertion by the Goodwins, the Guebles' statement is sufficient to establish that the guaranty is a guaranty of the lease. The lack of numbering in conjunction with the lease agreement and the lack of a notary certification do not raise a genuine issue of material fact

We next consider the Guebles' argument that the October 2004 judgment in the unlawful detainer action has res judicata effect on the present suit. For the doctrine of res judicata to apply, "a prior judgment must have a concurrence of identity with a subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made." Loveridge v. Fred Meyer, Inc., 125 Wn.2d 759, 763, 887 P.2d 898 (1995). The Goodwins argue that res judicata precludes the Guebles' lawsuit against them because the Guebles won an award of damages in the previous unlawful detainer action and the Guebles' request for additional damages in the present suit is barred. We disagree.

The Goodwins were not served in

the original lawsuit. The order in the original suit explicitly recognized that claims against Robert Goodwin were reserved. The prior judgment therefore lacked a concurrence of identity in parties. Res judicata does not apply.

Finally, we consider the Goodwins' argument that the superior court lacked personal jurisdiction over Nancy Mar. The Goodwins contend that the Guebles failed to meet their burden of showing that the court had personal jurisdiction over Mar. They base their argument on the fact that the Goodwins did not marry until 12 years after Robert Goodwin signed the guaranty, that Mar has been a longtime resident of California with no contacts with the state of Washington, and Mar did not own any interest in Canyon Park or benefit from the guaranty.

The Guebles respond that the trial court properly exercised jurisdiction over the Goodwins' community property. The Guebles contend that they clearly had personal jurisdiction over Robert Goodwin and that they named Mar as a defendant only to pursue their claim against the Goodwins' community property. They argue that the guaranty is enforceable against the Goodwins' community property under the community property laws of both California and Washington and that the court therefore did not err in exercising its jurisdiction. We agree with the Guebles.

The Guebles' lawsuit names Nancy Mar as a defendant, but only as a member of the Goodwins' marital community. The Goodwins do not contend that their community property cannot be reached to satisfy Robert Goodwin's premarital guaranty. Furthermore, Robert Goodwin's liability under his guaranty arose during the Goodwins' marriage, when Canyon Park breached the lease agreement. Liability under the guaranty was therefore a community debt.

The trial court properly concluded that it had jurisdiction over the Goodwins' marital community. We further note that the trial court restricted its judgment to the Goodwins' community property and explicitly ruled that "[t]his judgment does not extend to Ms. Mar's separate property." The judgment therefore allows recovery only from the Goodwins' community property.

In conclusion, we affirm the superior court's order granting summary judgment.

Columen, J

WE CONCUR:

Cox, J.

Baker, J